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THE PROPOSED INTERNATIONAL CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS: THE AFRICAN PERSPECTIVES

A note by the ECA Secretariat

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I. INTRODUCTION

1. In recent years the international community, and especially the United Nations family of organizations, has developed an increasing awareness of the potentials as well as the dangers arising from the policies, activities and impacts of transnational corporations (TNCs) on the development processes and on international relations. As result, the United Nations has initiated concrete measures aimed at the formulation of codes of conduct to regulate the activities of these corporations. Thus, following the Report of the Group of Eminent Persons appointed by the Secretary-General of the United Nations in 1972 to study the impact of TNCs on world development and international relations, 1/ the United Nations Economic and Social Council (ECOSOC) set up, in 1974, a Commission on Transnational Corporations 2/ which in turn appointed an Intergovernmental Working Group in 1976 3/ to elaborate such a code of conduct.

2. The Group prepared a comprehensive draft of the code for consideration by the Commission on Transnational Corporations 4/. Similarly, other United Nations bodies or specialized agencies such as UNCTAD and ILO are engaged in detailed studies on aspectsof the regulation of transnational corporations falling within their respective fields of competence 5/. As part of an overall effort to obtain inputs into the formulation of the comprehensive code from the various UN regional commissions, the Economic Commission for Africa (ECA) and the UN Centre on Transnational Corporations (CTC) jointly organized an African Regional Meeting in January 1977 to enable African states to co-ordinate their views on the Code 6/. It would seem that the main result of that Seminar was to introduce participating African states to the immensity of the problems posed by TNCs.

3. The principal aim of this paper is to review the main issues involved in the elaboration of an international code of conduct from the African perspective. In view of the high degree of involvement of TNCs in the continent's major economic sectors, especially in mining and agriculture, the proposed Code has special significance for Africa; and it is important to sensitise African policy-makers to its ramifications. 7/

II. GENERAL NATURE, OBJECTIVES, AND COVERAGE OF THE CODE

a) The Nature and Objectives

4. A code can be considered as a systematic compilation and revision of existing laws, statutory as well as judicial, into a coherent whole with a view to harmonizing internal conflicts, supplying ommissions, and generally clarifying and completing the body of laws on the subject to which it relates. In respect of the projected code of conduct on TNCs, however, there is no body of relevant laws, global in application and dealing specifically with TNCs. In the present context a code of conduct simply refers to the ab initio formulation of a comprehensive and systematic set of international principles or rules seeking to regulate the behaviour of transnational corporations.

5. The proposed Code of Conduct is an example of international effort seeking to regulate foreign investment in host countries, whether the vehicle used for the investment is the transnational or any other type of foreign-controlled corporations. In all cases the broad purposes underlying such codes are similar. They may aim at ensuring that the activities of foreign-controlled corporations are consonant with the development objectives of host states, through the characterization of certain acts or patterns of behaviour as either illegal, inappropriate or unusual. They may attempt to harmonize national laws on such corporations by the adoption of internationally formulated model legislation; to establish common standards of behaviour among governments for the protection of the legitimate concerns of these corporations; and to make their regulation more effective through institutionalized intergovernmental co-operation. In the case of TNCs, it is the latter purpose which stands out as the most paramount.

6. The basic African perception is that TNCs are not just any kind of business enterprises, nor are they ordinary types of foreign-controlled companies. They are corporations whose very size, multinational spread and command over financial and managerial resources easily overwhelm the supervisory capabilities of any particular country; they are entities whose operations produce such significant impact on national development and on international relations as to warrant national and international scrutiny. The global context in which TNCs operate necessarily limit national and regional efforts at controlling or even monitoring their activities. The basis of this institutional contraint is that while each unit of a TNC network is nominally subject to the laws of the country or region in which it is established, no single authority can exercise control over the network as such and its global operations. Thus divergences in objectives between a TNC and a host state are exacerbated by differences in their respective powers and scope of operations. Moreover the location of decision-making centres outside their borders suggest that TNCs may foster a pattern of international division of labour which perpetuates political and economic dependence. 8/

7. Indeed, the proposed Code of Conduct has several antecedents, varying in scope, geographical application, coverage of subject-matter, and degrees of success9/. While most of these efforts at creating multilateral conventions for the regulation of foreign investments either achieved limited success or outright failure, these experiences do not prevent further and, in some cases, more ambitious efforts at formulating such codes.

8. The significant background to the task of the UN Intergovernmental working Group on a Code of Conduct on Transnational Corporations lay in the fact that all those earlier efforts had either been sponsored by private organizations, or conceived as subregional or regional in scope, or where the perspective was global, they touched upon the subjects of TNCs in a rather general way, or had covered only specific aspects of TNC activities. The work of this Working Group represents the first endeavour by the international community to create a universal instrument specifically dealing with the activities of TNCs in their totality.

(b) Scope and coverage

9. There are three aspects of the coverage of this Code of Conduct, namely, the objects of regulation, substantive coverage, and geographical coverage. A number of questions come up for consideration here: Whose behaviour is to be regulated by the Code? Who, in other words, should be its objects? Should the Code cover only TNCs or should it regulate TNCs as well as governments in their policies towards TNCs, covering such topics as rules for the proper treatment of TNCs, and intergovernmental collective action and co-operation in the regulation of TNCs? Secondly, should the Code be a truly comprehensive document covering all relevant topiccs in some detail? Should it be comprehensive in coverage but fairly general, anticipating further elaboration over time or by specialized international organizations such as ILO and UNCTAD? Alternatively, should the Code be limited initially in the coverage of subject matter, moving progressively towards a broader coverage later? Finally, should it cover only TNCs in the developing countries, or should it have global application?

10. The Code to be effective would have to be comprehensive in coverage and fairly detailed in respect of all areas except those that are being elaborated upon by the various specialized agencies and separate UN Working Groups and Committees. These latter areas could be dealt with in a fairly general manner, thus providing an umbrella text for the more elaborate related documents. Furthermore, the Code should to cover TNC activities in both developed and developing countries.

III. LEGAL NATURE OF THE CODE

(a) Mandatory or Voluntary Code of Conduct?

11. Among the number of issues that arise for consideration under this sub-heading, perhaps the most fundamental is the question whether the Code of Conduct should be mandatory or voluntary in nature. A fully mandatory Code would be one in which all norms directed at states as well as TNCs would be obligatory;whereas a fully voluntary code would mean that the application of all norms directed at states and TNCs would be entirely at their discretion.

12. The optimal position of a mandatory Code would include provisions regulating the conduct of TNCs, provisions on intergovernmental collective action and co-operation in the implementation of the Code, on the treatment of TNCs by governments, and on implementation of the Code, would be in the form of an international Convention. The provisions on implementation would include compulsory settlement of disputes between states in the application and interpretation of the Code. The detailed provisions regulating TNCs could even be drafted as a kind of uniform law or legislative model and annexed to the Convention so that the contracting states would enact the actual text into their national legal systems. 10/

13. The basic argument in favour of such a position is that only a fully binding Code can be sufficiently effective in curbing the power of TNCs, in that the contracting states would be under a legal obligation to implement its provisions. Moreover, if the relevant provisions of the Code were compiled into a uniform law and enacted in identical language in all states adopting the Code, it would ensure uniform interpretation or application of its provisions. As against this position, it is argued that the uniformity sought by such mandatory arrangements would be too rigid and stifling for states in widely differing situations, and that not enough is known about TNCs to warrant such detailed and compulsory regulation. Moreover, it would probably take far too long for states to go through their national constitutional procedures to give effect in their domestic law to any uniform law drawn up on the basis of the Code 11/.

14. Consequently, there are others who advocate the adoption of a voluntary code of conduct on TNCs. Some of the positive points in support of such a position are that it would be easier for states to reach agreement with respect to such a code; that, given the limited knowledge and experience in this area, the time is not yet ripe to adopt a mandatory code. It is further pointed out that a voluntary code, in spite of its non-binding nature, would still have considerable impact because its moral force could make it a set of guidelines for TNC behaviour and a source of policy for governments. This possiblity does not, however, impress the critics of a voluntary code who argue that governments and TNCs alike would not respect a code with is not binding. It is also pointed out that in the absence of a kind of uniform law, states which adopt certain principles of the code could nonetheless do so in a manner that would allow important divergencies in the laws and practices concerning TNCs 12/.

15. However, between the optimal voluntary and the optimal mandatory positions, there are a number of possible permutations tending either towards the basically voluntary or the basically mandatory approach. One such option is to have a code which is essentially voluntary but which contains some implementation responsibilities of a largely monitoring nature, entrusted to one or more international institutions. These could consist of a secretariat collecting and studying reports from contracting states on the Code's application and preparing studies based on such reports; as well as an International Committee charged with the preparation and adoption of revisions of the Code. Another intermediary position towards the mandatory approach, would be to have provisions on some areas in a mandatory form and those on other topics in a voluntary form.

16. Depending on whether its provisions are essentially mandatory or voluntary, a Code of Conduct might take the form of a convention, a declaration or a resolution. These are among the various forms of instruments used in international relations to express the consensus of states with varying degrees of authority, specificity and binding force.

17. A convention signifies a multilateral treaty signed by sovereign states and endowed with a formal binding force. There are basically two types of conventions: in one model, the states parties to the instrument undertake to give effect to it, but are given the discretion to select the precise manner in which the provisions of the convention are to be incorporated into their domestic legal system 13/. In the other type, the contracting parties are obliged to incorporate the provisions of the instrument more or less verbatim in their domestic law. In this manner, the legislative measures eventually adopted by each state party in the implementation of the convention would be virtually identical, except for variations that are anticipated by the convention itself 14//

18. In the case of Declaration, the instrument does not ordinarily have the formal legally obligatory status of a convention or other forms of treaties, although it may expressly be given such a status if the participating sovereign states so intend 15/. But a Declaration generally does no more than express in solemn manner the common intent of the states to pursue a common policy or ideal 16/. A Code of Conduct in this form will therefore, not have a binding legal force. Similarly, resolutions, which are the usual type of instruments adopted by international organizations, are generally no more than recommendations to governments. In that respect, they do not have the formal binding force of a convention, though they can if the parties so intend, require certain action from those to whom they are addressed.

19. The ideal form of a code for the African States would be a fully mandatory instrument containing provisions that are overwhelmingly favourable to them, in that, while enabling the international community to effectively control the activities of TNCs, the provisions do not stifle African national efforts to pursue their chosen socio-economic path. Nevertheless, taking into account the relatively weak bargaining position of African States vis-a-vis the home states of TNCs, and having regard to the possibility that a fully mandatory code would contain provisions which might be disadvantageous to Africa, it is probably more realistic to expect a code which would be mandatory in respect of certain subjects, and essentially voluntary in respect of others.

(b) One Code of Conduct or a Mixed Set of Codes?

20. The adoption of regulatory provisions on TNCs, some of which are mandatory while others are voluntary, does raise the issue whether it would be more feasible to have a single code of conduct or a a mixed form of a code, consisting of more than one instrument of differing binding force. As far as the Code is concerned, the problem ceases to exist if the provisions ultimately adopted are either mandatory or voluntary in their entirety. But it is quite probable that the alternative may prevail, in which case Africa would be confronted with the choice between a single UN Code of Conduct whose provisions are partly legally binding and partly voluntary, and at least two separate Codes of Conduct, one of which contains the mandatory provisions and the other, the voluntary prescriptions. The first choice, adopted in the form of a treaty consisting of provisions with varying binding force, does not present a logically neat proposition. The voluntary part would probably have to be drafted in such a manner as to give them the form of mandatory provisions but with so much built-in discretion as to render them voluntary in substance. On the other hand, the second choice introduces time element as a problem in that the coming into effect of the legally binding instrument is likely to take longer than that of the non-binding one, due to the domestic processes of approval and ratification.

21. The separate but complementary work being carried on by UNCTAD and ILO on other aspects of a Code of Conduct on TNCs makes the second option of two or more instruments a real one. Clearly, there is a degree of coincidence and convergence in the projected contents of these sectoral codes and the UN comprehensive one; while, at the same time several particular areas are covered by one code only. Thus, either these sectoral instruments are all ultimately enmeshed with the wider code to become a single code of conduct, or the comprehensive code becomes a sort of umbrella instrument which will make references to, or incorporate by reference, the sectoral codes while the latter maintain their separate identities. In either case, there seems to be the need to establish formal relationships between the global and the sectoral codes in order to avoid either extensive overlapping or the existence of considerable gaps in each of them 18/.

(c) Addressess of the Code

22. Irrespective of the final nature of the code of conduct, it is clear that the instrument(s) will contain three basic categoreis of provisions; those intended to regulate the conduct of TNCs, those stipulating certain rules for the treatment of TNCs by states, and those dealing with intergovernmental co-operation in ensuring the effective application of the code. The objects of the provisions i.e. those whose behaviour is sought to be regulated, would thus be TNCs on the one hand, and states and intergovernmental implementation organs on the other hand. The question which now arises for determination concerns the addressess or subjects of the code instruments, that is, the entity or entities to whom the prescriptions should be directly addressed.

23. Another practical question that arises in the case of the code of conduct is whether some or all of its provisions should be addressed to TNCs or to both of them 19/. In reality, the problem arises only in respect of those provisions that seek to regulate the conduct of TNCs. It is obvious that those provisions seeking to establish a standard of treatment of TNCs for states, and those dealing with principles of intergovernmental co-operation would have to be addressed to states.

24. The possibility of addressing to TNCs the provisions that seek to regulate their conduct is often frustrated on the grounds that TNCs, as corporate individuals, cannot be subjects of international law, There are actually two senses in which the term "subject of international law" is understood, and it is the failure to distinguish between these meanings that often leads to the assertion that individuals are not subjects of international legal rules 20/. The term may be used to refer simply to an addressee of international law, that is, an entity on whom international legal duties and liabilities, as well as rights, can be directly imposed or conferred. In the other sense of the term, we mean an international legal person, that is, an entity with the procedural capacity to sue and be sued before an international tribunal, and with the capacity to enter into contractual relations with other legal persons recognized by international law. It is in this latter sense that individuals are generally excluded from the subjects of international law.

25. In either sense of the term, however, individuals may be said to be subjects of international law. There are several instances in which rights as well as duties have been directly conferred or imposed on individuals, such as the rights of protection bestowed on slaves, 21/ the human rights of individuals recognized and made enforceable under certain conventions, 22/ and the criminal liabilities imposed on pirates, on war criminals after the Second World War, and on persons who commit the crime of genocide 23/.

26. It would seem, then, that the provisions of the code seeking to regulate the conduct of TNCs would be more appropriately addressed to contracting states, who should in turn take appropriate measures in their national legal systems to apply them to TNCs within their jurisdiction. Code provisions dealing with the treatment of TNCs by states, with the intergovernmental co-operative action, and with the establishment of implementation machinery would naturally be addressed to states.

IV. SUBSTANTIVE ISSUES TO BE COVERED BY CODE: APPRAISAL WITHIN THE AFRICAN CONTEXT

27. From discussions of the character of the Code and its provisions, one can now consider the substantive issues expected to be covered by it. The approach here would be to examine the nature of the problem posed by TNCs in a particular sphere of activity in terms of the social, political and economic concerns and developmental aspirations of Africa, within the following possible options and responses:

(a) The Lagos Plan of Action and the Code

28. The outcome of the negotiations leading to the possible adoption of a code of conduct on transnational corporations is yet to be known. Far less clear are its likely implications on the Lagos Plan of Action. It may fulfill the hopes and aspirations of African investee states;or it may turn out to be rather disappointing. However, it would seem useful, while awaiting the outcome, to direct our thoughts at some of the indices that could be used to appraise the substance of the instruments which ultimately emerge from the current negotiations.

29. The basic issues expected to inform the substance of the Code, as far as the African region is concerned, should be the host state's fundamental socio-economic and political imperatives within the framework of the Lagos Plan of Action. One definite way of arriving at these fundamentals is to examine the relevant economic and political declarations, resolutions, conventions and similar documents to which African states are parties, as well as national economic development plans and policy statements, in order to discover the direction of the vision, objectives and strategies of socio-economic development that have emerged as a sort of leitmotif in the perception of African political leaders and other policy makers.

30. There have been many such international instruments since 1960 - on the global level, among the developing countries as a distinct group, and with the African region itself 24/. A cursory look at the documents reveals certain basic aspirations and strategies, which can be summarized as follows:

(a) A rapid rate of self-sustaining or autonomous growth and diversification, and of capital accumulation and industrialization, so as to remove mass poverty and improve the living standards of the people, especially those living in the rural areas;

(b) Promotion of self-reliance at national and regional levels through the exercise of full and permanent sovereignty over natural resources, joint exploitation thereof, and integration of national markets;

(c) Reduction of income differentials between the urban and rural sectors and between the rich and the poor within each community;

(d) Attainment of an equitable income distribution pattern by increasing employment opportunities through greater use of labour-intensive techniques of production and creation of local resource-based industries;

(e) Increase in foreign exchange earnings through the expansion and diversification of exports (agricultural and manufactures), and a corresponding reduction of imports to improve the balance-of-payments; and

(f) Implementation of measures designed to assist the least developed, land-locked and island developing countries in overcoming the handicaps of their particular disabilities.

31. The substantive provisions of the Code of Conduct, in relation to the Lagos Plan of Action would be in the interest of Africa only to the extent that the resolution of the issues involved reflect and promote the above objectives and strategies. The substantive issues will now be discussed under four headings: regulations on the activities of transnational corporations; the treatment of the corporations by governments; and intergovernmental co-operation 25/. The manner in which the issues have been stated here, as well as the suggestions made for possible resolution thereof, are heavily influenced not only by our perception of Africa's general developmental concerns, but more concretely, by the findings of a number of recent case studies on TNC involvement in export-oriented primary commodities in selected African countries 26/.

(b) Obligations of Transnational Corporations

(i) Observance of Local Laws:

32. There is always a potential conflict of jurisdiction and loyalty between the host state of a TNC and its home state of third state, engendered by the possibility of extraterritorial application of laws in areas such as anti-trust, taxation, export controls, and technology transfers. The problem of extra-territoriality arises from the fact that although TNCs are creatures of national laws, and hence subject to the national jurisdiction of the state of incorporation, the impact of their activities transcends national boundaries, and they have related operations within their global structure which are located in other jurisdictions. Consequently, the invocation of the jurisdiction of other states becomes a real possibility, as different governments seek to reach one or more of the units of TNCs. On the other hand, extraterritorial application of laws of foreign states, and the preference by TNCs of the laws of their home states over those of their host states, undermine the sovereignty of the latter states.

33. Each contracting state might therefore undertake to adopt measures necessary for the enactment into its domestic legal system of provisions ensuring that affiliates, branches, or parent companies of TNCs, operating within its territory observe the laws of their host state, which could be designated the applicable law in respect of their activities. Contracting parties could also be made to refrain from extra-territorial application of their domestic legislation, unless its exercise is permitted under a bilateral or multilateral agreement.

(ii) Adherence to Economic Goals and Development Objectives:

34. TNCs undertake projects and pursue policies which are not necessarily in consonance with the development objectives of host states, especially in the areas of trade diversification, industrial and regional development, promotion of technical innovation and skill, and income policies. However, TNCs could contribute positively to development in conformity with the goals and objectives of the host state. This presupposes a great deal of autonomy for the branches or subsidiaries of TNCs; otherwise the enhancement of the objectives in each of the countries in which the TNCs affiliates operate would present difficulties in view of potential conflicts between the national priorities of the various countries concerned.

35. In addition, TNCs might undertake to establish within their financial capabilities and business purposes, effective forward and backward linkages with domestic enterprises in order to avoid the creation of foreign enclaves and to fully integrate their operations into the overall economic development efforts of host states.

(iii) Adherence to Socio-Cultural Objectives and Values of Host State:

36. Because the top management of TNC subsidiaries tend to be nationals of home state or other foreigners, and because TNCs are driven almost exclusively by the profit motive, they are prone to disrespect or ignore the socio-cultural values of host states in their business practices, and to introduce harmful consumption patterns into host states which can least afford them. There is no doubt whatsoever that some of these values, originating from traditional society, constitute a drag on rapid economic growth and on modernisation in general. Ordinarily, then one would advocate adherence to only those socio-cultural values which do not stand in the way of modernisation and efficiency. The problem, however, is that once we confer this sort of cultural eclecticism on TNCs, it might lead to a more general disrespect for the culture of the host state and might encourage TNCs to foster foreign ideas and cultural patterns which are in no sense necessary for economic development per se.

(iv) Respect for Human Rights and Fundamental Freedoms:

37. Some TNCs operate in countries such as South Africa which practice racist policies or otherwise violate fundamental human rights; in consequence, the corporations indirectly provide economic and political support for such regimes 27/. There are two alternative approaches that one can adopt towards such a situation. One could urge that TNCs operating in such countries should continue with their international organisations, and do everything else in their power to promote human rights and fundamental freedoms. This position, it should be pointed out, does not dispose of the argument that the very presence of these corporations strengthens the economy, and hence the political system of these countries. On the other hand, the advocates of this position are quick to point out that it is the foreign corporations that sustain the indigenous African population and the working classes, and that without them, these elements could not make a living.

(v) Non-Interference in Internal Political Affairs:

38. TNCs are known to have engaged in political intervention aimed at over-throwing unfriendly governments in some countries, or to have applied pressure of various forms in support of or against particular regimes. Some of them are also known to make illegal contributions to political parties or candidates for public office, or otherwise orchestrate the electoral process. All such practices are in conflict with the generally accepted principles of sovereignty and non-interference in the internal affairs of states by other states or their nationals 28/. Yet a pertinent question which arises here is whether there are any permissible public activities, such as certain forms of community or cultural activities, to which TNCs could properly contribute. This issue was raised by the Group of Eminent Persons in their Report without providing any definitive answer. The problem posed here is that if it is the ruling authority that is to determine the scope of permissible contributions, it could define it to serve its partisan advantage.

(vi) Non-Interference in Intergovernmental Relations:

39. There are two aspects to the interference of TNCs in intergovernmental relations. In the first case a TNC may enlist the support of its home state to exert pressure on the latter in resolving differences between it and the host state. In the second situation, the home state of the TNC attempts to use it as a vehicle for intervening in the internal affairs of the host state, or generally as an instrument of foreign policy of the home state.

40. The first situation finds a partial justification in international law, which grants to a state the right to protect its subjects when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels 29/

(viii) Ownership and Control:

41. There is universal acknowledgement of the right of all states to exercise full and permanent sovereignty over their natural resources and other forms of wealth 30/. This proposition amounts to an affirmation of ownership, which is associated not only with the right of possession, but also with control over the modalities for the use and disposal of such resources. Among the possible implications and consequences of the proposition are the right of a state to make rules relating to the authorisation, restrictions and prohibitions on the exploitation of resources within the state's frontiers; the creation of a framework for the eventual assumption of ownership or management of foreign-owned productive enterprises; and, in the absence of an amicable agreement as to the formula for participation or takeover, a resort to nationalisation. In Africa, the major means of production are still in the hands of foreign-based TNCs. Hence, there is a greater possibility of manipulating the continent's resources to frustrate development objectives.

42. Thus from an African point of view, the Code should reaffirm the right of every state to freely exercise full and permanent sovereignty over its natural resources and other forms of wealth, and over the manner of their exploitation. Such a right could be interpreted to include the right to control the inflow of foreign investment, to regulate the establishment and operations of foreign-owned enterprises in its territory, and to control such enterprises through participation in equity or management, or both.

(ix) Abstention From Corrupt Practices:

43. TNCs may indulge in various corrupt practices adversely affecting the balance-of-payments and tax revenues of host states and undermining the loyalty of public officials. Such practices include bribery of public officials (illicit payments), transfer pricing, illegal repatriation of profits and capital, tax evasion and misrepresentation of business information to government.

(x) Restrictive Business Practices:

44. TNCs often indulge in restrictive business practices ranging from restrictive clauses and transfer pricing in the interest of their global network; cartel marketing arrangements involving the sharing and controlling of specific markets; price fixing in domestic markets leading to the elimination of competitors or to inflationary consumer prices; various abuses of industrial property rights, such as transfer of technology at unreasonable prices, and unreasonable export restrictions in licensees; to a general orientation towards monopoly in production and marketing, including the control of raw materials and intermediary components by other firms. Such practices give rise to domination of key sectors of the host economy by TNCs, leading to political influences and manipulation, and to higher prices paid by consumers on account of decreased competition. 31/

(xi) Balance-of-payments and Financing:

45. The capital inflow into Africa from investment, as well as income from exports, do not often represent net savings in foreign exchange when juxtaposed to capital outflows in the form of payments for capital goods imported on the establishment of TNC productive enterprises, fees for technical services and management, research and development activities, repayment of loans, and repatriation of capital. These problems of capital outflow are compounded by transfer pricing 32/.

46. Consequently, TNCs could be called upon to endeavour to alleviate the balance-of payments problems of host states, by ensuring that their investment represents a net saving in foreign exchange through such policy measures as increasing local processing of commodities, profitable diversification and expansion of exports, reinvestment of profits in host states, and lesser dependence on foreign loans and a shift to greater equity capital as a source of financing projects.

(xii) Taxation:

47. TNCs are known to practise certain forms of tax fiddling related to transfer pricing, including underpricing of affilitate imports to reduce import duty liability; overpricing of such imports to reduce profits from particular operations and move them to more favourable tax jurisdiction, thereby affecting corporate tax receipts in the country of operation; inflation of expenses of visiting company executives and of head office expenses, and other inter-company payments. TNCs may also indulge in other forms of tax evasion and deliberate tax avoidance.

48. TNCs could therefore be made to abstain from business practices resulting in tax evasion and ill-motivated tax avoidance. They would make full and complete disclosure of their business transactions to enable the authorities to assess their true taxable base and thereby arrive at an equitable tax assessment in respect of them. The prescriptions on transfer pricing outlined above should also be made applicable under this heading. Furthermore, contracting states could undertake to negotiate bilateral and multilateral treaties and other arrangements aimed at institutionalizing the exchange of information on the profits, income and tax liabilities of TNCs as a vehicle for combatting tax evasion.

(xiii) Transfer of Technology:

49. TNCs dominate technology due to their large size,which make them centres of scientific and technical production; the large expenditure devoted to research and development activities; the organisation and production of technology on a global scale; and a systematic policy of process innovation 33/. TNCs tend to sell their technology at excessive costs and on other burdensome terms; for example, restrictive licensing agreements, and packaged technology deals seeking to tie up the sale of technology to investment capital and management. There is also the problem of the general inappropriateness of technology sold to the less developed countries in terms of their levels of development and possibilities of spill-overs into the local economy 34/. Then there is the centralisation and concentration of research and development activities outside the host states, thus denying them real opportunity to develop their national technological capabilities. All these factors lead to the weakening of the bargaining position of African countries in their technological needs, as well as a general dissatisfaction with the conditions under which technology is acquired from TNCs and its impact on their societies.

(xiv) Employment and Labour:

50. The contribution of TNCs to the generation of local employment is relatively insignificant due to their largely capital intensive production processes. Moreover, the level of responsibility of local employees tends to be unsatisfactory, since foreign TNC emplyees maintain control over engineering and management posts, leaving local people to fill production positions, middle and lower level supervisory positions, and middle-level marketing functions 35/. Quite often TNCs resist or resent host state's social welfare, health and employment policies and pursue anti-trade union practices.

51. The Code could therefore call on TNCs to endeavour to deploy technologies which generate greater employment both directly and indirectly. They could be made to institute training programmes for local workers to upgrade their employment levels and opportunities, taking into account the employment policies and long-term development objectives of the host state as well as of the enterprise. They could undertake to provide the best possible wages, social benefits, retirement provisions and working conditions within the framework of government policies; and disclose in the host state all safeguard measures and special working conditions which they observe in their home countries to protect the health and safety of workers 36/.

(xv) Consumer Protection:

52. The quality and safety of TNC products are often in question; and the prices may be much higher than similar products in the same or foreign market, without any justifiable reason for the price differentials. Moreover, sufficient information concerning the characteristics and attributes of products (e.g. through adequate labelling) is not generally furnished to consumers.

(xvi) Environmental Protection:

53. There is the need to protect the environment on health and aesthetic grounds; from this angle, industrial pollution and the perpetuation of mine pits are objectionable. There is also the need to protect the environment on economic grounds. The environment is part of a nation's natural resources, which should not be depleted needlessly. From this standpoint, practices such as deforestation and the maintenance of open mine pits in areas with agricultural potential are also indefensible. Moreover, TNCs often pay insufficient attention to the environment, and may in fact invest in particular host states simply because they are pollution havens with minimum standards of environmental protection.

(xvii) Accounting and Reporting Standards:

54. The collection, analysis and dissemination of information on TNCs are necessary for the evolution of effective mechanisms for striking fair bargains in negotiations leading to the establishment of projects. Subjects on which such information is very useful include the global organizational structure of a given TNC, its ownership pattern, financial structure, turnover, nature of the technology intended to be used in the proposed project, sales network, and such other information as would enable the national authorities to make rational choices between competing TNCs for a given project.

55. For the purpose of effective negotiations towards the establishment of TNC operations, their parent companies could therefore be made to provide information on their global organisational structure, marketing operations and technology which will enable the host country to make rational and responsible decisions on the project proposals. On the establishment of the project, TNCs could be made to provide to host states, on a regular basis, such accounting and other information on their operations as shall enable the authorities not only to arrive at a true assessment of their tax liabilities and the extent of financial outflows attributable to them, but also to formulate rational and realisitic government policies on international business operations in general 37/. TNCs could also undertake to provide the public and trade unions or other representatives of employees with such information as is reasonably required for the protection and defence of their interests.

(xviii) Contribution to Regional Integration:

56. One of the themes in current developmental literature is regional economic integration, which is of particular importance to Africa. Individual African States are generally handicapped in efforts at planned economic change and rapid development by the limited national resources available, small size of markets, lack of capital for large and efficient industrial complexes, and weak bargaining positions vis-a-vis foreign interests. Hence there is the real appreciation for a wider African regional economic grouping as an instrument for the major agricultural and industrial production required by a modern economy.

57. Ordinarily, TNCs should welcome efforts towards regional integration because of the opportunity it affords them for economies of scale in their production and for wider markets for their products. In practice, however, they are essentially interested in vertical and not horizontal integration, and may thus view economic integration merely as an opportunity to market affiliate company brands of products either manufactured abroad or assembled by the branch plants which are mere extensions of their production lines in Africa. Such an approach does not contribute significantly to the growth of technical skills or to real industrial development, since it merely utilises existing facilities in the particular area of economic grouping.

(c) Treatment of Transnational Corporation by Governments

(i) Repatriation of Dividends and Capital:

58. There is the general agreement that the timely transfer of income from investment capital and repatriation of capital in the event of disinvestment (whether voluntary or forcible) contributes immensely to a stable and equitable investment climate for foreign private direct investment. On the other hand the chronic balance-of-payments difficulties of host states and their requirements for essential goods and services for the population undercut their ability or willingness to repatriate such amounts promptly. There is clearly a need to balance the interest of the investee states with the legitimate claims of the investors.

(ii) Nationalisation and Compensation:

59. The assertion of the principle of permanent sovereignty over natural resources often stands in sharp conflict with the reluctance and even the refusal of TNCs to accept controls by host states over their operations, including arrangements for the progressive transfer of ownership to a host state or its nationals. If such a conflict remains unresolved over time, the state often takes to nationalisation as a last resort. Indeed, the developing countries generally regard nationalisation as a means of recovering their natural resources or transferring ownership of foreign-owned property to themselves, and also as a form of redistribution of the world's wealth.

60. International law generally recognises the right of a state to expropriate foreign private property as an expression of its sovereignty 38/. However, traditional notions of international law, especially as advanced by the Western capital-exporting nations, have always sought to impose severe limitations upon this right. In the traditional doctrine, the act of a state in depriving an alien of his property engages its international responsibility, and claims arising therefrom are international in character and may appropriately be adjudicated upon by international tribunals 39/. Furthermore, such a measure is proper under international law only if it is done for a public purpose, 40/ non-discriminatory in respect of aliens, and accompanied by just compensation, 41/ which is interpreted to mean "prompt, adequate and effective" compensation 42/. The rule that nationalisation gives rise to international responsibility is part of the substantive rules of the so-called minimum standards of international justice for aliens, which the capital-exporting countries seek to enforce through the practice of diplomatic protection of nationals abroad 43/

61. The traditional view of state responsibility relating to nationalisation is opposed by another doctrine, espoused largely by the Eastern European socialist states and many developing countries, which assert that it is the national law that determines the conditions for the law fulness of nationalisation, and that only the courts of the nationalising state have jurisdiction over any related claim. This arises from the concept of equality of treatment or national treatment, whichwhich is to the effect that no alien is entitled to a better treatment than a national of a host state, and that any preferential treatmentunder the rubric of minimum standards of international justice amounts to assigning aliens to a special regime in the state, thereby creating a state within a state 44/.

62. Moreover, the conditions imposed on the legality of nationalisation is stoutly; resisted 45/. In the first place, the "public purpose" limitation, understood not in the sense that the expropriated property must continue to be exploited or managed by a state-owned or state-controlled entity, but that the nationalising act itself must be shown to have been taken in the public interest, is rejected by many states. It is asserted that nationalisation as an expression of state sovereignty lies within the sole discretion of the state, taken on the basis of all circumstances which it considers pertinent and in conformity with its national constitution, laws and regulations, and not necessarily on the grounds of an objectively determined public interest 46/.

63. Equally controversial is the idea that payment of compensation is, as it were, part of the definition of a lawful nationalisation. Some states take the view that the absence of compensation does not render expropriation illegal, and that the measure remains lawful for all purposes, including transfer of title 47/. It is the nationalising state which should determine whether or not it is appropriate to pay compensation. On the whole, however, it is valid to say that most doctrine and much state practice associate compensation with nationalisation, even if the former is not admitted as a necessary ingredient of the latter.

64. As to the adequacy of compensation, several formulas have been advanced for its computation, reflecting differing notions of fairness or appropriateness 48/. The best known among these are the capitalised market value of the nationalised property, the replacement value, the depreciated book value, and the sales value of the real assets. The depreciated book value cannot be attacked in good conscience by the TNCs since it uses the very value officially and formally recorded by them in company books in their prior dealings with government authorities. The corporations cannot be heard to argue for one valuation for purposes of tax payments, and a different one for purposes of compensation.

(d) Intergovernmental Co-operation

65. The wide disparities and contradictions in the laws and policies of host states in respect of TNC operations afford them the option to establish themselves in inadequately protected states, thereby generating competition among potential host states and reinforcing the bargaining position of TNCs.

66. In addition to the general obligation to enact the substantive prescriptions contained in the Code into their national laws, contracting states could undertake to harmonize their laws and policies relating to TNCs through bilateral and other multilateral arrangements, particularly in the areas of preincorporation procedures, fiscal incentives, terms for the repatriation of profits and capital, and taxation, with a view to strengthening the bargaining position of host states. In the implementation of such policies of harmonisation, account should be taken of the differences in levels of development of the contracting states. There are other aspects of intergovernmental co-operation which relate to the machinery for the implementation of the Code, to which we now turn.

V. IMPLEMENTATION MACHINERY FOR THE CODE

67. Of crucial importance to the whole idea of a Code of Conduct is the machinery devised to ensure the implementation of its provisions. A partly or fully mandatory code that lacks an effective machinery for implementation is a self-defeating proposition.

(a) Exchange of Information, Clarification and Interpretation of the Code

68. The Code would require different levels of implementation; national, regional and interregional. The machinery at the national level is expected to induce, require or assess compliance by TNCs and governments with the provisions of the Code. At this level, each contracting state could undertake to enforce conscientiously the Code provisions, as enacted into its domestic law; and to make such modifications and amendments in existing relevant laws, including their companies code, as would give full force and effect to the Code of Conduct. Each contracting state could also agree to give reciprocal recognition to, and enforce the final decisions and similar measures by the courts and administrative tribunals of other states arising from the implementation of the Code.

69. Each contracting state could undertake to establish a National Committee charged with the collection, analysis and dissemination of information on TNC operations in its territory, including the extent of compliance with the provisions of the Code and relevant national laws. The Committee would *inter alia* advise Government agencies in negotiations with TNCs and also act as the focal point of contact with the subregional, regional and international agencies referred to below, particularly in the dissemination of information. In this connection, it is worthwhile noting the welcome development in the African region, where the ECA Conference of Ministers, by its Resolution 326 (XIII) adopted in Kinshasa in March 1977, urged each member State of ECA to establish a separate national unit to monitor the activities of TNCs within its territory and to deal with national and regional programmes arising therefrom. In March 1979, in Resolution 347(XIV), the Council of Ministers repeated its call on ECA member States to set up such units, suggesting the broadening of their functions to include advisory services to Governments, parastatal organisations and private enterprises in negotiations with TNCs 49/.

70. At the interregional level, CTC could be reorganised to serve as the Secretariat of the Commission on Transnational Corporations in the tasks assigned to the latter below. CTC could also be made responsible for the dissemination of information on TNCs on an interregional basis, the monitoring of the implementation of the Code provisions at the national and regional levels, liaison with the National Committees and the Joint Units on TNCs, and servicing the Panel of Experts dealt with immediately below 50/.

(b) Arbitration and Settlement of Disputes

71. On the supposition that the Code when eventually adopted will assume a partially or fully mandatory form, the need for dispute-settlement schemes would involve sovereign states who are the contracting parties. Disputes with TNCs would be the normal occasion on which the dispute settlement machinery would be invoked. Here there are several possibilities, moving at different levels of compulsion.

72. The States could jointly establish an International Panel of Experts to be charged with inquiry (consultation) and conciliation between the states parties to a dispute 51/. Under the procedure for inquiry or consultation, there could be either a voluntary or compulsory submission of a dispute to a Panel, drawn from the same list as the Panel of Experts on Interpretation and Clarification, with power to determine the law and facts in respect of particular disputes or cases, but without the power to issue decisions or judgements. Under conciliation, there could be either voluntary or compulsory submission to a Panel, with power to issue decisions in respect of particular disputes referred to it, accompanied by the freedom of the parties to reject or accept the decision.

73. Groups of countries could also institute Panels of Experts for Arbitration or settlement of disputes. Here, one could have either a voluntary or compulsory submission of disputes to the Panel, chosen by the parties directly or under an agreed procedure and applying such rules of law and procedure are agreed upon by the parties, with power to make binding decisions or awards in respect of particular disputes referred to it. Finally, the Code could establish a procedure for a voluntary or compulsory recourse to a permanent and regularly-staffed machinery, applying generally established rules of law and procedure, with power to make binding decisions in respect of particular disputes referred to it. An example of this is the International Court of Justice.

74. Doubts and controversies arising from the contract are to be exclusively decided by the competent tribunals of the state in conformity with its laws and shall not give rise to foreign diplomatic intervention under any circumstances. This principle is an extension of the doctrine of national treatment and purports to designate the alien natural or juridical person as a national of the host state for the purposes of the contract 52/. It constitutes the most logical complement to the demand for the observance of local laws, since it would vest both the applicable law and the proper forum in the host state.

75. But provided there is no such procedural incapacity, it seems plausible to subject any dispute as to the interpretation, application or implementation of the Code, or any contract entered into on the basis of the Code, to the exclusive jurisdication of the host state, unless the parties have mutually agreed to its submission to particular procedures of an international forum either before or at the time of the occurrence of such dispute. In the event of such an agreement, the parties could utilise the procedures and facilities of the International Centre for the Settlement of Disputes, 53/ or of the International Chamber of Commerce 54/.

76. In addition to relevant and effective dispute-settlement schemes, we should not lose sight of the necessity for a permanent machinery charged with the overall responsibility for the supervision and successful implementation of the Code. In this regard, the United Nations Commission on Transnational Corporations could be entrusted with policy-making and supervisory powers over the Centre on Transnational Corporations in the secretarial functions assigned to the latter, subject to the general directives of the United Nations Economic and Social Council. The Commission could also be assigned the responsibility of making recommendations for the resolution of problems arising from the implementation of the Code, and for possible revisions thereof, to ECOSOC, which would in turn draw the attention of the contracting states to such recommendations for appropriate action.

SUMMARY OF CONCLUSIONS

77. The proposed international code of conduct is expected to have provisions calling upon TNCs to scrupulously observe local laws of the host country; to adhere to its economic goals and development objectives; to refrain from inteference in internal affairs and in intergovernmental relations; to adhere to the socio-cultural objectives and values of host country; and to respect human rights and fundamental freedoms. In the economic, financial and social fields, we expect the Code, inter alia to affirm the right to ownership or control of TNCs as an exercise in the full and permanent sovereignty over natural resources. There should be provisions calling upon TNCs to abstain from corrupt practices and unfair restrictive business practices, including transfer pricing;to avoid policies that worsen the balance-of-payments of host states; to desist from tax evasion and avoidance; to transfer appropriate technology at reasonable prices; to adopt employment and labour policies that enhance the job opportunities and technical skills of indigenous workers; and to disclose more information on their worldwide organisational structure, operations and accounting methods.

78. Concerning the treatment of TNCs by Governments, it is hoped that any provisions on the obligation of governments to transfer dividends and repatriate capital in the event of disinvestment will take cognizance of the right of the host state to postpone timely transfers which would aggravate its balance-of-payments problems. Host states may acknowledge the right of investors to demand compensation in the event of nationalisation; but this would only be in respect of appropriate compensation, possibly based on the depreciated book value of the nationalised assets. In respect of implementation of the Code, we have explained that this would require structures at the national, regional and interregional levels to take care of its different aspects. There would be the need for structures concerned with exchange of information, clarification and interpretation of the Code; and there would be dispute-settlement organs at various levels.

79. Whatever the legal nature and the substantive provisions of the Code might eventually be negotiated, there seems to be a general concern that it should be effective. Effectiveness in this context is understood to refer to the extent of its actual impact on those entities whose behaviour is expected to be regulated by it.

80. Of equal relevance to this consideration is the effectiveness of the machinery for implementation of the Code provisions, including the monitoring agencies and the nature of the sanctions established. Above all, what would be most crucial in predicting the effectiveness of the Code of Conduct on Transnational Corporations are the real intentions of the contracting states, namely, the extent to which they are truly committed to its stated objectives. Indeed, it is from the angel of the Code's effectiveness, as well as the extent to which its proposed provisions satisfy the indices for appraisal already outlined in this paper, that African states should view the current negotiations leading to the possible adoption of the Code.

F O O T N O T E S

1. The Group of Eminent Persons was appointed under the authority of ECOSOC Resolution 1721 (LIII) of 1972. Their report issued in 1974, is entitled "The Impact of Multinational Corporations on Development and On International Relations" (UN:E/5500/Rev.1).

2. Under ECOSOC Resolution 1913 (LVII), December 1974; The Commission is an Intergovernmental Subsidiary Body of ECOSOC.

3. At its Second Session in Lima in March 1976. The Working Group had its First Session in January 1977 and its latest Session (the Tenth) in May 1980.

4. See Report of the Intergovernmental Working Group on a Code of Conduct on its fifteenth, sixteenth and seventeenth sessions (E/C.10/1982/6), 5 June 1982.

5. See for instance (1) UNCTAD, Draft International Code of Conduct on the Transfer of Technology; (2) ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; (3) UNCTAD, Principles and Rules on Restrictive Business Practices; (4) The International Code on Marketing of Breast-milk substitutes; (5) International standards of Reporting and Accounting; and (6) UNCTAD, International Agreement on Illicit Payments.

6. Report of the African Regional Meeting on a Code of Conduct for Transnational Corporations (E/CN.14/674, February 1977).

7. See also ECA, Transnational Corporations in Africa: Some Major Issues (E/CN.14/703); UNCTC, Multinational Corporations in World Development (ST/ECA/190); and UNCTC, Transnational Corporations in World Development: A Re-examination (E/C.10/38).

8. See generally: "The Impact of Multinational Corporations on Development and on International Relations," op.cit.; UN, Multinational Corporations in World Development, (1973 ST/ECA/190); UN, Transnational Corporations in World Development: A Re-examination (1978 E/C 10/38); Raymond Vernon, Sovereignty at Bay (London: Longman Group Ltd. 1971).

9. On the global level, see the draft International Convention on the Treatment of Foreigners, 1928 (League of Nations); draft Havana Charter on International Trade Organization, 1948; ICC Model International Code of Fair Treatment for Foreign Investments, 1949; the draft Abs/Shawcross Convention on Investments Abroad, 1959; the draft Harvard Law School Convention on the International Responsibility for Injuries to Aliens, 1961.

On regional levels, we have the examples of the draft Economic Agreement of Bogota (1948), the draft General Inter-American Economic Agreement (1957), the Andean Foreign Investment Code (1970), the OECD Guidelines for Multinational Enterprises (1976), the Treaty Establishing a Customs and Economic Union of Central Africa (ULDAC) (1964), Convention on Investments in the States of UDEAC (1965), the Treaty for East African Co-operation (1967), and the Treaty of the Economic Community of West African States (ECOWAS, (1975).

10. UN, "Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to Its Possible Legal Nature". (E/C/10/AC.2/9, December 1978).

11. Ibid, pp.34.

12. Ibid, pp.27.

13. An example is the Convention on a Code of Conduct for Liner Conferences of 1974. (UNCTAD:TD/CODE/11/Rev.1, and Annex 1).

14. See, for example, the Hague Convention Relating to a Uniform Law on the International Sale of Goods, 1964.

15. Eg. The Declaration of Paris, 1856.

16. Eg. Universal Declaration of Human Rights, 1948.

17. A Resolution may combine the characteristics of a Declaration and a recommendation. The principles involved may be declared as being appropriate or desirable, and are then recommended to the relevant actors for adoption and compliance.

18. This is especially true of the UN comprehensive code of conduct, which aims at covering as many activities of TNCs as possible.

19. Provisions addressed to TNCs would be of the type: "Transnational Corporations shall do this or that" or "shall not do this or that". Those addressed to states would be of the sort: "States shall do this or that" or "States shall not do this or that"; or "Shall take all measures necessary to ensure that TNCs do this or that or do not do this or that".

20. J.G. Starke, Introduction to International Law (London: Butterworths, 6th Edition, 1967, pp.54, Max Sorensen (ed.) Manual of Public International Law (Lusaka: National Educational Company of Zambia, 1968, pp. 249-250).

21. Eg. Geneva Convention on the High Seas, 1958.

22. International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; International Convention on the Elimination of all forms of Racial Discrimination, 1965; the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

23. See Agreement Between U.S., France, U.K. and Soviet Union for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, 1945.

- Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

See also Advisory Opinion on the Jurisdiction of the Courts of Dawig, PCIJ (1928) Series B, No. 15, which acknowledges the right of states to bestow rights and impose duties upon individuals through treaties.

24. The important declarations in this area include the following:

- The Lagos Plan of Action
- General Assembly Resolution on Concreted Action for Economic Development of Economically Less Developed Countries (Res.1515 (XV), 1960)
- Resolution on Permanent Sovereignty Over Natural Resources (Res. 3171 (XXVIII) December 1973).
- International Development Strategy for the Second United Nations Development Decade (Res.2626 (XXV) October 1970)
- Declaration on the Establishment of a New International Economic Order (Res. 3201 (S-VI), May 1974); Programme of Action on the Establishment of a New International Economic Order (Res.3202 (S-VI).
- Charter of Economic Rights and Duties of States (Res. 3281 (XXIX) December 1974)
- Lima Declaration and Plan of Action on Industrial Development and Co-operation (UNIDO Doc. ID/B/155/Add.1, April 1975)
- Arusha Declaration for Collective Self-reliance and Framework for Negotiations, (UNCTAD: TD/236, February 1979)

25. The nature of the general problems posed by the activities of TNCs has been outlined at greater length in a number of UN and other publications.

Some of the major issues as they relate specifically to Africa have also been stated more amply in "Transnational Corporations in Africa: Some Major Issues"" (ECA: E/CN.14/703, 16 March 1979).

26. These studies, carried out under the drrection of the Joint ECA/UNCTC Unit on Transnational Corporations, form part of interregional Studies conducted in Africa, Asia and Latin America.

27. UNCTC, reports on the activities of transnational corporations in Southern Africa (E/C.10/26; E/C.10/39; E/C.10/83; ST/CTC/12; E/C.10/1982/11) which analyse these issues in greater detail.

28. See also R. Venon, Sovereignty at Bay, New York, Basic Books, 1977

29. This is the approach adopted by the EEC in its Code of Conduct for South Africa, adopted in September 1977 by the Council of Ministers.

30. United Nations, Permanent Sovereignty over Natural Resources, (E/C.7/53) of 31 January 1975; and United Nations General Assembly resolutions 1515(XV) of December 1960 and 1803(XVII) of December 1962.

31. See also UNCTAD, Principles and Rules on Restrictive Business Practices (by Colin Greenhill).

32. ECA, "Transnational Corporations and the Excessive Outflow of Financial Resources from the Developing African Countries" (Working Paper No.3, Joint ECA/CTNC Unit on TNCs, September, 1979). Anglais Seult.

33. See UNCTAD, Draft International Code of Conduct on the Transter of Technology (TD/CODE/TOT/25) and UNCTAD, Negotiations of an International Code of Conduct on the Transfer of Technology (TD/CODE TOT/27).

34. UNCTC, Technology Transfer Through Transnational Corporations (ST/CTC/II) pp. 16-22.

35. See relevant chapter on ILO's Report on World Employment Conference, June 1976.

36. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (by Hans Gunter).

37. See reports of the Ad Hoc Intergovernmental Working Group of Experts on International Standards of Reporting and Accounting. This Group was established in 1979 by ECOSOC resolution 1979/44.

38. Anglo-Iranian Oil Case (1956) ICJ Rep. 36

39. Marguerite de Joly de Sabla Case (United States V. Panama), American and Panamanian General Claims Arbitration, 1933 (6 United Nations Report of International Arbitral Awards, 358, 366).

40. Norwegian Shipowers Case (Norway v United States), 1922 (1 United Nations Report of International Arbitral Awards), 309. See also decision of the Supreme Court of Aden in Anglo-Iranian Oil Co. Ltd. v. Jaffrate (1953). 1 WLR 246.

41. Oscar Chinn Case (United Kingdom v. Belgium) PCIJ Ser. A/B No. 63; Norwegian Shipowers Case (op. cit. fotnote 30).

42. See generally, R. Lillich, The Valuation of Nationalised Property Under International Law (1975).

"Promptness" refers to the speed with which compensation is paid; "adequacy" relates to the quantum of payment; and "effectiveness" refers to the transferability or convertibility of the compensation paid.

43. See A. Roth, Minimum Standards of International Law Applied to Aliens (1949); E. Borchard, "The Minimum Standard of Treatment of Aliens", 38 Michigan L. Review 445 (1940).

44. This view was eloquently expressed by the 19th century Argentinian Foreign Minister, Carlos Calvo, in 1892. See also C. Calvo, Le Droit International. (1885 5th Edition) pp. 231.

For recent affirmation of this position, See Latin American Resolution presented in October 1972 at the 12th Session of the UNCTAD Trade and Development Board in the Course of the debate over the Chilean Kennecott nationalisation Case. (UNCTAD: TD/B/SR. 330; TD/B/421 Annex iii).

45. For an account of the progressive development in the new trends, see A.O. Adede, "International Law and the Property of Aliens: The Old Order Changeth." Malaya Law Review, Vol. 19, No.1, July 1977, pp. 175-193.

46. See the Latin American Resolution at the UNCTAD meeting in 1972, op. cit. footnote 34. See also UNCTAD Resolution 88 (XIII), 1972; Charter of Economic Rights and Duties of States, 1974, Art 2 /GA Resolution 3281 (XXIX)/.

47. See decision of the Bremen District Court of 1959 concerning the Indonesian legislation of 1958 nationalising Dutch Enterprises, reported by Domke in American Journal of International Law (1960) Vol. 54 at pp. 306-307, 312-315. Also, the case of In Re Claim by Herbert Wagg and Co. Ltd. (1956) Ch. 323,

48. Norman Girvan, "The Question of Compensation: A Third World Perspective" Vanderbilt Journal of Transnational Law (Spring, 1972)

49. By way of technical assistance to the member States in the establishment of the national units, the ECA Secretariat has put out a paper entitled: "Operational Guidelines for the Establishment of National Units for Co-ordinating Government Policies Relating to Transnational Corporations in Africa" E/CN.14/CTNC/4, 28 November 1979.

50. Precedents for a secretariat with information and servicing functions are to be found in the Convention on a Code of Conduct for Liner Conferences, 1974 (UNCTAD: TD/CODE/11/Rev.1 Annex 1, Art. 46); and the International Development Strategy for the Second United Nations Development Decade, Section D.

51. Precedents for such a Panel are to be found in the OECD Guidelines for Multi-national Enterprises, the General Agreement on Tariffs and Trade, the ILO Convention, the United Nations Human Rights Commission;

52. Max Sorensen, op. cit. pp. 590-591.

J.G. Starke, Introduction to International Law, op. cit. pp. 259-261.

North American Dredging Company Case, (United States v. Mexico), Annual Digest of Public International Law Cases, 1925-1926, No. 218.

The validity of this clause is often challenged on the grounds that a private individual has no right to renounce the right of his government to protect him abroad and to see to it that the dignity of the state does not suffer from injury through the violence done to its nationals. In response to this argument, it is pointed out that what the alien is waving is not the state's right of diplomatic protection over its nationals, but his own power to

request the exercise of that right in his favour. It would seem from the decided cases that so long as the waiver is applicable only to matters connected with the contract, the clause is regarded as valid in international law.

53. The Centre (ICSID) was set up under a 1965 Convention under the auspices of the World Bank to provide for settlement of international investment disputes between a contracting state and nationals of another contracting state on a voluntary basis and in accordance with the rules laid down in the Convention. The Centre itself does not act as arbitrator or conciliator, but simply maintains a panel of qualified persons from whom conciliators and arbitrators are selected by the parties, and also provides the necessary facilities for the conduct of the proceedings.

54. ICC has a Court of Arbitration which administers a code of rules especially adapted to the settlement of international trade or commercial disputes. Arbitration is open to members and non-members alike.

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TRANSNATIONAL CORPORATIONS IN AFRICA: SOME MAJOR ISSUES
A NOTE BY ECA SECRETARIAT

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Introduction

1. The purpose of this paper is to identify the major issues relating to the activities of transnational corporations in Africa and their significance from the standpoint of the socio-economic development of the region with a view to the Conference recommending some policy measures which member States may wish to adopt in the coming years.

2. It is useful to stress that the assessment of the costs and benefits of transnational corporations in Africa is not an easy matter. This is because existing methodologies for such an analysis are still inadequate as research in this area is relatively new. Moreover, information on such activities in Africa is not readily available at this point. Despite these limitations, it is important to have an understanding of the major issues of concern to African Governments and to assess their significance in light of the available information.

PART I: ECA AND TRANSNATIONAL CORPORATIONS IN AFRICA

3. In 1974, the United Nations General Assembly created the Commission on Transnational Corporations as an intergovernmental subsidiary body of the United Nations Economic and Social Council. It is a forum within the United Nations system for the comprehensive and in-depth consideration of issues relating to transnational corporations, and for spelling out areas of priorities for study and action in this field.[1/] In order to implement policies of the Commission on Transnational Corporations, the Economic and Social Council also created the Centre on Transnational Corporations (CTNC) is located in New York, as an autonomous body within the United Nations Secretariat that serves as a focal point for global issues on transnational corporations and acts as secretariat to the Commission on Transnational Corporations.

4. The objectives of the work programme of the Centre are to further the understanding of the nature of transnational corporations and of their political, legal, economic and social effects on home and host countries and in international relations, particularly between developed and developing countries; to secure effective international arrangements aimed at enhancing the contribution of transnational corporations to national development goals and world economic growth, while controlling and eliminating their negative effects; and to strengthen the negotiating capacity of host countries, in particular the developing countries, in their dealings with transnational corporations.

5. In order to support the work of the United Nations at regional levels, the Economic and Social Council called upon the Centre on Transnational

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1/ See United Nations General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974 containing the Declaration and the Programme of Action for the Establishment of a New International Economic Order; resolution 3281 (XXIX) of 12 December 1974 containing the Charter of Economic Rights and Duties of States; and Economic and Social Council resolutions 1908 (LXII) and 1913 (LVII) of 5 December 1974 on transnational corporations.

Corporations and the regional commissions for Africa, Asia, the Pacific, Europe, Western Asia and Latin America to create joint units. In the African region, prior to the creation of the Joint ECA/CTNC Unit on Transnational Corporations, ECA commissioned a four-man mission to undertake a survey of transnationals activities in 16 African countries, representing each subregion.[2/] Each member of the mission visited four countries during 1977.

6. The mission's findings, which are summarized below, served as the groundwork for the establishment of the work programme of the Joint Unit.

(a) Agriculture

7. In most of the countries surveyed transnationals were found to play an important role in the cash-crop and food processing industries, dating back to the colonial period. More recently, agro-business companies have started a new thrust of foreign investments in capital-intensive and high technology projects ranging from livestock and dairy products to highly mechanized cultivation of such tranditional crops as maize and groundnuts. The impact of these developments has yet to be studied.

8. It was found that some countries have taken steps to control the activities of transnational corporations in major parts of the agricultural sector, including marketing. Others continue to practise an open door policy toward transnationals in agriculture.

9. The activities of transnationals in African agriculture were found to be concentrated in the following products and industries: coffee, tea, cocoa, palm products, groundnuts, corn, sugar, oilseeds, fruits and vegetables, cotton and wood industries. The major corporations include Lonrho, Unilever, Nestle, the Commonwealth Development Corporation, Tate and Lyle and Libby.

(b) Extractive industries

10. Given the importance of this sector, most of the countries surveyed have taken steps to control foreign companies, but the measures taken by these countries have not necessarily led to effective control. In particular, they have resorted to equity shares, including majority ownership by the host country, which has tended to leave effective control in the hands of transnationals through management and technical assistance. Exception should be made in the case of petroleum production where the producing countries have succeeded in owning and controlling oil companies.

[2/] The countries visited by the mission were: Algeria, Botswana, Egypt, Gabon, the Ivory Coast, Kenya, Lesotho, Liberia, Morocco, the Niger, Nigeria, Sierra Leone, the Sudan, Swaziland, Zaire and Zambia.

11. The major mining products which have attracted transnational corporations include petroleum, diamonds, iron ore, copper, bauxite, coal, uranium, etc. So Some of the transnationals still in control of mining industries include the Anglo-American, Corporation and the DeBeers group in South Africa and Bureau Général de Recherches Minieres in French-speaking West Africa.

(c) Commerce and industry

12. The pattern of the involvement of transnational corporations in this sector varies depending on the level of development of each country and the control mechanisms used in it. Where control is weak, it is found that the higher the degree of industrialization, the greater the involvement by transnationals. But in absolute terms, the level of that involvement remains modest compared to what it is in other regions. The reasons commonly given in the small size of most African markets.

13. Some of the countries visited sought to attract private foreign investment by changing their strategies from import-substitution to export-promotion. But this shift appears to have failed to result in a substantial increase in the level of foreign investment in manufacturing industries. It should be pointed out that the same countries find themselves competing with one another as they offer similar incentives to prespective foreign corporations.

14. The industries in which transnationals have been most interested include infrastructure (dams in particular), petrochemicals, pharmaceuticals, textiles, food processing, beverages, footwear, and assembly-based industries (trucks, automobiles and some electric products). The major corporations include Lenrho, Unilever, Bayer, Fiat, Berliet, Bata; Philips, Singer, IBM, Saviem, etc. No data are yet available on the extent of their involvement all over Africa.

(d) Tourism and services

15. Information on this sector is still sketchy. The mission found that tourism-oriented countries attract large international tourist concerns which tend to control most aspects of the tourism industry. In one such country, however, the Government has taken steps to encourage local entrepreneurs in co-operation with State enterprises to control nearly 90 per cent of the tourist-oriented infrastructure. But foreign groups continue to organize and manage the actual tourist.activities. Transnational banking is another area where foreign interest play a decisive role and seem to cause serious concern to the Governments of many of the countries that were visited. Despite their predominance in the financial sector, transnational banks do not appear to be willing to assist host governments in financing their development plans.

(e) Relations between transnational corporations and host Governments

16. The mission found that the control measures undertaken by host Governments have on the whole not been effective except in the cases of outright nationalization. Elsewhere, control through legislative, institutional and other means could easily be frustrated by transnational corporations. Transfer pricing, management, engineering and financial control were used effectively by transnationals to escape the measures by the host Governments.

(f) Establishment of the joint ECA/CTNC Unit on Transnational Corporations

17. The Joint ECA/CTNC Unit became operational in October 1977 as part of the International Trade and Finance Division of the ECA secretariat.[3/] It is the focal point for activities of the Centre on transnationals in Africa, especially in the fields of research, information and liaison with the Governments of the region. The Joint Unit is responsible for the following functions:

(a) To assist African countries in developing national and multinational policies and capabilities relating to transnational corporations. To this end, the Joint Unit, in co-operation with the Centre on Transnational Corporations, shall organize and carry out advisory services, training workshops, seminars and regional intergovernmental meetings on matters related to transnational corporations;

(b) To conduct studies, analyses and related activities on economic, social and institutional issues on transnational corporations concerning Africa, in particular, through case studies. The Joint Unit in this way provides inputs for the studies and analyses carried out by the Centre and other United Nations bodies;

(c) To develop contacts with and monitor the activities of African governmental as well as non-governmental organizations in order to explore and identify the problems and needs related to transnational corporations, and assist these organizations in meeting them;

(d) With the support of the Regional Data Bank to be established by ECA, to assist the Centre on Transnational Corporations in collecting and analysing information on matters related to transnational corporations in Africa as an integral part of the comprehensive information system of the Centre on Transnational Corporations;

[3/] See Economic and Social Council resolution 1961 (LIX) and the Agreement between the Executive Secretary of ECA and the Executive Director of the Centre on Transnational Corporations establishing the Joint ECA/CTNC Unit on Transnational Corporations for the African region.

(e) to assist the Centre on Transnational Corporations in identifying and acting on areas of co-operation with African organizations outside the United Nations system dealing with the subject of transnational corporations; and

(f) to assist the Centre on Transnational Corporations in its work related to the preparation of a code of conduct.

18. Owing to the lack of adequate information about transnational corporations in Africa, the bulk of the work of the Joint Unit is devoted to research, studies and the collection and establishment of a comprehensive information system on transnationals. Its information activities include the preparation of profiles on major corporations operating in Africa, the collection of contracts and agreements signed between transnationals and African Governments, as well as laws and regulations governing foreign investment in Africa. This information will be made available to States members of ECA when it is adequately processed.

19. In the area of research, the Unit has been conducting studies on the activities of transnational corporations in the field of primary commodity exports (e.g. coffee, cocoa, cotton, bauxite and copper) with a particular focus on the process of negotiation between African countries producing these commodities and transnationals. The Unit has also initiated a study on the impact of transnationals on the balance of payments of African countries and is in the process of planning several other studies. Some of these studies, e.g. tourism and banking, are being planned in close co-ordination with the Centre of Transnational Corporations.

20. In the field of technical advisory services, the Joint Unit works closely with the Centre in providing member States with the assistance they may request. The Centre has also commissioned studies on the role of transnationals in banking and in tourism in Africa. A paper on transnationals in southern Africa was published in the CTC Reporter. In addition, a number of workshops on negotiations with transnationals have already been organized at the national and subregional levels. Workshops, seminars and conferences will be a permanent feature of the work to be undertaken by the Unit.

PART II: MAJOR ISSUES RELATING TO THE ACTIVITIES OF TRANSNATIONAL COPPORATIONS IN AFRICA

The nature of the problem

21. The activities of transnational corporations involve many sectors and sub-sectors of the African economies. Essentially, the degree of intensity of their impact tends to vary from one country to another, depending upon the degree of involvement in each case. Thus any generalization abou the impact of transnationals on Africa's socio-development process runs the risk of over-simplification. However, from a general standpoint the major issues relating to the activities of transnationals in Africa can be set out as follows: financing economic development; transnational corporations and employment in African issues relating to the purchase and acquisition of technology by African countries; impact of transnationals on the balance of payments of African countries; restrictive and corrupt practices; negotiating capability of African countries vis-a-vis transnationals; issues of developing a comprehensive information system relating to transnationals, collective self-reliance through regional economic co-operation; issues of ownership and control of resources; and issues relating to the formulation and implementation of an international code of conduct. These issues are each examined in turn below.

(a) Financing economic development

22. The mobilization of resources, both local and foreign, and their utilization to promote a faster rate of economic growth in Africa constitute major economic policy issues. In terms of transnationals, it can be stated that the financing of economic development projects is an area where such corporations could make one of their greatest potential contributions to Africa's development. [4/] Yet it is also in this very area that African countries experience some of the greatest disappointments in their relationship with the corporations.

23. In African countries, the Government determines development policy through the national development plan and expects the private sector, including the transnationals, to play a significant part in the financing of development projects. Parastatal financial institutions such as development banks lack either the power or the opportunity to raise funds over and above the inadequate capital subscriptions from private concerns or subventions from the Government. The latter itself directly mobilizes some resources through duties on imports and exports, property taxes, personal income taxes and other forms of taxes, supplementing such revenue from internal and external borrowing.

24. Owing to their superior knowledge and techniques in preparing financially sound investment packages, their scale of operations and their extensive international connexions, transnational corporations are generally able to obtain

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[4/] For an examination of this issue within the context of world economy, see Richard J. Barnet & Ronald E. Muller, Global reach: The power of the multinational corporations, New York, Simon and Schuster, 1974, chapter 7.

greater resources than can be negotiated by most individual African Governments or indigenous enterprises. Transnationals do not necessarily finance projects through equity investment drawn from their own resources, but rely largely on loans for the greater portion of the financing. Consequently, in many cases, the debt/equity ratio of a project may be pitched so high as to require minimum financial commitment on the part of the foreign investor.

25. In the financing of economic development, an important problem that often arises in negotiating with transnational corporations for the establishment of projects, relates to the fixing of fair and advantageous debt/equity ratios. Further problems arise in the formulation of an over-all development policy for restructuring the money and banking institutions from a developmental perspective and to follow up this strategy with concrets and clear policy guidelines on a periodic basis and especially in time of economic crisis when drastic measures are called for. Such institutional restructuring and interventionist measures which would help to channel a greater flow of resources into the African economy as development proceeds become difficult where transnationals wield the controlling hand.

(b) Transnationals and employment in Africa

26. Another equally important policy issue in Africa's development efforts relates to the creation or improvement of employment opportunities. The key issues can be summarized by the following points. What is the significance of the foreign companies' contribution to the level of employment of African countries? Do these companies help to develop employment generating capabilities in these countries? Do they help to develop skills which would meet the needs of the host countries? The three issues are tied to the kind of production function used by the transnational corporations which, in the final analysis, determines the level, composition, quality and long-term contribution to the host economy of the personnel employed by the corporations.[5/]

27. The contribution by transnational corporations to the level of employment in host countries has been shown by several empirical studies to be relatively unimportant. For example, it is estimated that the total number of employees of transnationals operating in all developing countries ranged from 3 to 4 million in the mid-1970s. The estimated total labour force of these countries ranged from 600 to 700 million.[6/] Thus, employment by transnationals barely reaches 2 per cent of the labour force. By themselves these statistics are not very meaningful except perhaps in disputing the claim made by some transnational executives concerning their companies' contribution to employment.

5/ See C.V. Vaitsos, "Employment effects of foreign direct investments in developing countries" in Employment in Developing Nations, Edgar. O. Edwards (Ed); New York, Columbia University Press, 1974.

6/ G.L. Reuberm, Private foreign investment in development, (Oxford, 1973).

28. Transnational corporations still insist on maintaining their control over engineering and management posts through the use of their own nationals, or in any event, expatriate "corporation men". Thus, in one study based on some 50 projects, it was found that local employees filled virtually all production posts, over 90 per cent of supervisory positions (foremen and the like), nearly 80 per cent of middle-level sales and marketing functions, but only a very small proportion of engineering and management posts, and virtually none of the top management positions.7/ To insist on greater indigenization of transnational corporation employment is only a small step which would result mainly in improving the material situation of local employees. Indeed, except for top management, many transnationals are willing to indigenize. They even are willing to train local recruits for all but top management posts. But this approach cannot provide African countries with an adequate solution if the foreign company's choice of technology and production process is left untouched.

29. In examining a proposed project to be financed by a transnational, the host Government often experiences problems in determining specific criteria for the choice of the kind of technology and subsequent employment contents of that project. The critical questions that are difficult to answer are whether: (i) the training policy of the foreign company is likely to develop skills which have long-term effects on the promotion of the country's pool of technological labour force; (ii) the training is consistent with the country's own educational and training programmes; (iii) the foreign company's employment and training policies can develop managerial and entrepreneurial skills which can be used fruitfully outside the company; (iv) serious attention has been given to labour-intensive production processes, although some sectors may require the use of high-technology processes such as oil, metal and chemical industries; (v) ways can be found to scale down imported production processes without reducing efficiency or productivity while increasing employment opportunities: and (vi) the foreign company adheres to the host country's social welfare, health and employment policies and regulations.

(c) Issues relating to the purchase and acquisition of technology by African countries

30. The question of the acquisition of technology for African development poses far greater issues than is sometimes readily appreciated. An issue of concern to host Governments is how to acquire or purchase technology from transnational corporations without incurring excessive costs demanded by transnational corporations. An equally important issue is to ensure that the imported technology to be incorporated into the host countries' development strategies is "appropriate" to their level of development and provides spill-overs on the local economy by enhancing the domestic technological capability.8/ Another concern for African Governments is how to develop local technological capabilities which would, for a time, complement imported technology and, more important, lay the foundation for the achievement of technological self-reliance.

7/ Ibid. chapter 5.

8/ UNCTAD, Handbook on the acquisition of technology by developing countries Page 4.

31. The term "technology" needs to be more properly defined as "society's pool of knowledge regarding the industrial arts" 9/ or "the study and practice of developing practical uses of the findings of science towards production or improvement of goods or services" 10/. Under the new definition, "technology" refers not only to production techniques, but to the whole range of categories of practical knowledge, covering production, transformation, distribution and marketing of goods and services as well as such supporting activities as training, research and development, mobilization of human and material resources, institutionalization of organizations for the development of technology, etc. Under this definition and assuming that a genuine transfer does takes place the transfer of technology from transnational corporations to African countries takes on a new meaning and becomes potentially more fruitful. African Governments would then go beyond "contractual transfer" through licence agreements and the like and insist on a genuine transmission of knowledge through training, research and development including development on their capacity to transform the technology that has been "transferred" to them.

32. The overriding considerations with regard to the "transfer" of technology are the following: (a) the predominance of transnationals in the international market of technology, particularly industrial-managerial technology; (b) the weakness in the bargaining powers of African countries with regard to the satisfaction of their technological needs; (c) the confusion and myths surrounding transnational-generated technology and the alleged need for it; and (d) the subsequent dissatisfaction of African policy makers with the conditions under which technology is acquired from transnationals and the impact of that technology of their societies.

33. The predominance of transnationals as sellers of technology can be explained briefly by the following factors 11/ the large size of transnational corporations often located in highly concentrated technology-intensive sectors. This makes them important centres of scientific and technical production; and the large expenditures devoted by such corporations to reach and development (R&D). several

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9/ See Edwin Mansfied Industrial Research and Technological Innovation N.Y.W.M. Norton (1968) and Jack Baranson "Transfer of Technical Knowledge by International Corporations to Developing Economies", American Economic Review, 56, (May 1966), pp. 259-67.

10/ ECA, The Application of Science and Technology to Development in Africa (May 1978).

11/ See C.A. Michael "The international transfer of technology and the multinational entreprises" Development and Change, 7 (1976), 157-174 and Muguel Wionewek "Notes on technology transfer through multinational entreprises in Latin America" Development and Change, 7 (1976), 135-155.

studies have shown that these expenditures reach up to 20 per cent of all funds devoted to R&D activities in industrialized OECD countries. 12/

34. Not only do transnational corporations hold such an over-whelming power as sellers of technology, but they also increase their monopoly position by tying up the sale of technology to investment packages and forcing African countries to negotiate for the package as a whole. Given the urgent need for capital in most African countries, the desire to get transnational-generated capital often overshadows the importance of negotiating for a genuine transfer of technology. This results in relative weakness of African countries is their technological capabilities. 13/

35. This dependence is reflected in the ratio of imported knowledge to Africa's production needs, the haphazard imports of that knowledge without the use of efficiency criteria and the one-way flow of knowledge reducing the potential for exchange and assimilation. Weakness and dependence result in (a) the loss of control of decision-making in programming, production and marketing; (b) the frequent import of inappropriate technology in terms of inputs and the type of demand created, and (c) the reduced negotiating power of African countries in the purchase of technology. 14/

36. Most transnational corporations insist on selling technology, capital and management in one "package". This gives them an effective control over the use of their technology in all phases of a project including feasibility and market surveys, engineering design, plant construction and installation of equipment, process technology, management and operation of production and marketing.

37. The attempt by some host countries to exercise control over the technology component of a foreign project through joint-venture schemes, including majority ownership of equity, misses a central issue. Control over a foreign company can be exercised much more effectively through technology than through equity participation. Majority equity ownership will neither reduce the technological dependence of the host country nor ensure a genuine transfer and diffusion of the imported technology. The main issue in this regard is the need to insist on "depackaging" technology from the other components of the foreign project. This can usefully be achieved within the context of (a) control of the transfer of imported technology; (b) setting up alternative ways of acquiring technology; and (c) incorporation of the technological needs of African countries in their development strategies and programmes.

12/ See United States Senate Committee on Finances: Implications of Multinational firms for world trade and investment and for United States Trade and Labour (Washington, 1972) pp. 562-569, and K. Pavitt: "The multinational enterprise and the transfer of technology" in J.H. Danning (ed): The Multinational Enterprise (Longon, Allen & Unwin Ltd., 1971), P. 61.

13/ See The application of science and technology to development in Africa, ECA op. cit.: UNESCO Survey of the scientific and technical potential of the countries of Africa.

14/ The application of science and technology, op. cit., p. 83

(d) Impact of transnationals on the balance-of-payments of African countries

38. Another important issue affecting Africa's development efforts is the problems of balance of payments. The balance-of-payments difficulties faced by many African countries are due to many factors, some of which are beyond their control. The key issue here is the specific role played by transnationals in adding to those difficulties. The following discussion will focus on (i) the extent to which the impact of transnationals can be measured, (ii) an assement of that impact based on available evidence, and (iii) proposals for corrective measures.

39. To measure the full range of effects of the operations of transnationals on the balance of payments of host countries would require a greater degree of analysis than is possible in this brief paper. To this end a paper on the impact of transnationals on balance of payments in Africa is under preparation. For the moment, it may be useful to begin by distinguishing between "direct effects" and "indirect effects" 15/. The direct effects result first from the initial effects of the flows of capital and imported capital goods for the establishment of an affiliate; second, from the recurrent effects of the affiliates' exports, imports of inputs, service and management fees, dividends and interest payments by the affiliates and any other disguised or hidden payments incurred by the affiliate as a result of say, transfer pricing or payment for R&D activities and third, from the terminal effects of the repatriation of capital and repayment of loans. With the exception of hidden or disguised payments, direct effects are both identifiable and measurable, at least when balance-of-payments statistics are compiled thoroughly and regularly.

40. The indirect effects result from the 'immediate multiplier' effects of the initial injection of capital into the economy which can increase aggregate demand and the demand for imports. They also result from the "sustained multiplier" effects due to the current operations of the affiliates. Indirect effects are much more difficult to isolate and measure than direct effects. The difficulty is increased by the need to estimate what would happen, in the absence of foreign investments, to the demand for imports and the performance of exports. Analysts have yet to develop adequate tools for measuring indirect effects.

41. The difficulty of measuring the impact of transnational corporations is further increased by the existence of hidden or invisible transactions. This is particularly serious in the cases of the use by transnationals of "leads and lags" and "transfer pricing" techniques. "Leading" is the payment of a loan before maturity and "lagging" is a delay in payment. These practices are commonly used in intra-firm transactions including trade and services, transfer of dividends, intra-company credit and loans. Their use, on instructions from the parent company, is based on the need to keep funds in one part of the company or another depending on such factors as liquidity needs, exchange rate fluctuations, tax considerations and the like. The use of leads and lags makes it difficult to identify the transactions even if they appear under recognizable categories such as "royalties", "dividends" and "interest". In the balance of payments, they often appear under "errors and omissions".

15/ See Madeuf et al. "Impact of TNCs on the balance of payments", CTNC.

42. Transfer pricing is even more difficult to detect because there is as yet little empirical evidence in the case of African countries.16/ But a number of important studies of the impact of transnationals on the balance of payments of several developing host countries were carried out by UNCTAD.17/ These studies are valuable in that they break new ground and focus on areas of transnationals' activities requiring the attention of authorities. These areas cover intra-firm transactions, including export restrictions and transfer pricing; taxation of profits and royalties; alternative uses of local capital; technology transfer; and the degree of protection of the market enjoyed by the foreign company.

43. The UNCTAD studies have shown considerable evidence of the use of transfer pricing by transnationals. A study of one country revealed that corporations over-priced imports of certain products by anywhere from 20 to 3,000 per cent in comparison with their world market prices. For a sample of 14 firms, the average over-pricing of imports ranged from 24 to 300 per cent of world market prices.18/ When combined with the practice of under-pricing exports, the net effect of transfer pricing can be very substantial indeed and further deteriorate the balance-of-payments difficulties of host countries. Transfer pricing also distorts the profits declared by transnationals; the cost of technology, R&D and other fees paid by the affiliates; and the interests paid on intra-company loans. The cumulative and substantial effects of these practices, worsened by the extreme difficulty of controlling them, can all but frustrate the host countries' efforts at redressing their balance-of-payments deficits.

(e) Restrictive and corrupt practices

44. Restrictive practices by transnational corporations cover a wide spectrum of activities undertaken by them for the purpose of tightening their control over a given project or a product line or a particular market. These activities include licensing and patent agreements intended to restrict trade and technology, cartel arrangements for sharing and controlling specific markets, price fixing, exclusive dealing arrangements, consignment selling, etc.,

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16/ UNCTAD Intra-firm transactions and their impact on trade and development seminar programme, report series No. 2, May 1978.

17/ "Balance of payments effects of private foreign investment; case studies of Jamaica and Kenya," July 1970, (TD/B/C.3/79/Add.2), "Balance of payments and income effects of private foreign investment in manufacturing; Case studies of India, and Iran," December 1971 (TD/B/C.3(V)/Misc.1); and "Balance of payments and income effects of private foreign investment in manufacturing; case studies of Colombia and Malaysia, " May 1973 (TD/B/C.3(VI)/Misc.1). Balance of payments effects of private foreign investment in developing countries; Summary of case studies of India, Iran, Jamaica and Kenya", April 1972 (TD/134/Supp.1). p.p. Streeten et S. Lall, Foreign investment, transnationals and developing countries, (London: Macmillan, 1977), Part II: The country studies.

18/ UNCTAD, Main findings of a study of private foreign investment in selected developing countries, (TD/B/C.3/111, p.12). See also United States Senate Committee on Finance, Implications of multinational firms for world trade and investment and for United States trade and labour (Washington D.C. 1973), R.H. Bell, "Private capital movements and the United States balance of payments position" in Factors affecting the United States balance of payments, Joint Economic Committee, United States Congress; I. Polk, I. Meister and L. Veit, United States production abroad and the balance of payments (New York, 1968), W.B. Reddaway, Effects of the United Kingdom direct investment overseas (Cambridge, 1967); G. Hufbauer and F.M. Adler, Overseas manufacturing investment and the balance of payments (Washington D.C.; United States Treasury Department, 1968); R. Stobough, Nine investments abroad and their impact home: Case Studies on MNES and the United States Economy (Boston, Harvard U. Press, 1976).

45. A few examples will illustrate the negative effects of restrictive practices. Trade mark rights can be invoked to prevent unauthorized imports by third parties of trade marked products originating from a particular corporation. In the area of territorial market arrangements, particular markets are assigned to particular members of a cartel with fixed quotas and agreed prices. Price fixing can also be used effectively by a corporation to increase its profits beyond what the market normally permits when it holds a monopoly position in that market. It can also be used to eliminate competitors and achieve a monopoly. In this case, the foreign corporation may deliberately lower its prices even at the cost of sustaining temporary losses. Finally, restrictive practices can be used to limit the export ability of the host country. This is usually done through licence agreements. The licencee may be prevented from exporting certain products to any country. In other instances, the licensing corporation can impose quotas coupled with territorial limitations on the licencee.

46. Corrupt practices tend to be more difficult to detect, given their covert nature. They can be economic or political in character. In economic terms, corrupt practices can be found in transfer pricing (over-pricing of imports and under-pricing of exports), illegal transfer of funds from the host country, disclosure of misleading or information to the host Government, and illicit payments in international commercial transactions.19/

47. The widespread use of restrictive and corrupt practices by transnationals has so far been facilitated by the great diversity of national laws and regulations governing foreign investment in host countries and the absence of any international machinery designed to control those practices.20/ But this situation has been changing rapidly in recent years.

48. At the national level, many countries have experienced problems in taking specific measures in an attempt to control restrictive and corrupt practices. These measures include (i) legislative amendments and enactment of new legislation; (ii) court decisions and interpretation of existing laws; and (iii) administrative action with regard to the enforcement of these laws. As a result the scope of the legislation government restrictive and corrupt practices has been widened and its effect is being felt. But it should be noted that with the exception of a few developing countries only industrialized countries have acted decisively in this area.

(f) Negotiating capability of African countries vis-a-vis transnational corporations

49. In arranging the terms for the establishment of new projects by transnationals African government officials tend to rely on negotiations at the enterprise level as a supplement to, or more often in place of, regulations and policies which provide a rather general framework for investment. The central rationale of this approach is the recognition that each project may be sufficiently different from others to warrant individual treatment. This being the case, the host Government can strike a good bargain by taking into consideration such constantly changing variables as technological advances, volume of world production and market conditions.

19/See also, UNCTAD, Dominant positions of market power of transnational corporations: Use of the transfer pricing mechanism (TD/B/C.2/167).

20/See also UNCTAD, The international market power of transnational corporations (UNCTAD/ST/MD/13), 14 April 1978.

50. An important problem in this respect arises from the absence of a sufficient number of qualified negotiators in most African countries. Transnational corporations generally operate at a level of sophistication that often beats the comprehension of even the more experienced authorities of their home States. In negotiating with them for a new project, therefore, it is important for the officials of the host State to master the highly technical aspects of investment if they expect to gain the best terms for their country.

51. There are other important technical issues for negotiators to take into consideration. The project as proposed by the transnational corporation has to be thoroughly appraised to ensure that both the economic and social rates of return prove advantageous to the host country. It is advantageous for a host country to be able to determine the formula for fixing land rents, mineral duties, royalties, or all of these, especially if the project concerns mining or agriculture. Corporate income taxation of the host country needs to be carefully studied because it provides the main instrument for an effective and equitable distribution of gains from the project. Moreover, an understanding of the mode of determination of prices for the product in question is crucial, as it may not be subject to the general rules of supply and demand, but determined by independent product exchanges, cartels and intra-firm considerations.

52. One approach to this relative lack of expertise in Africa has been to resort to experts from non-African foreign countries as negotiators on behalf of host Governments. This, however, is not a very satisfactory solution, for the value orientation of such negotiators is more often than not likely to be much closer to that of the corporation officials than that of the recruiting country, whose needs and aspirations they may not sufficiently identify with.

53. In order for African host countries to derive the best from transnationals' investments, they should continue to take positive steps to improve their negotiating capability. Programmes for the training of nationals in the technical areas of investment negotiations should be accelerated. In the meantime, more positive use could be made of consultants from other developing countries who are more likely to share the development objective and value orientations of the host country. In this connexion, one should also underline the facilities of the technical advisory services to developing countries engaged in negotiations.

(g) Issues relating to the development of a comprehensive information system relating to transnational corporations

54. The collection, analysis and dissemination of information on transnationals activities in the African region is a precondition for evolving effective mechanisms for controlling their activities. One of the ways of solving this problem is to establish national organizations charged with such tasks. At the international level, the United Nations has been making considerable efforts. The lack of adequate and reliable information on transnationals in the African region is evidenced by the problems of developing effective policies in a number of important areas. The ability to make rational and responsible choices among competing corporations in respect of particular projects, and between alternative policies governing the activities of transnationals depends largely on access to and comprehension of, reliable information on the competitors and their operations.

55. The availability of adequate information is also pertinent in the pre-establishment as well as the post-entry stages of transnationals' operations. For the purpose of negotiations leading to the establishment of such operations, host country officials need, but do not often possess; sufficient information as to the organizational structure of the corporation in question: for example, its geographical spread, the names of its holding company, subsidiaries or affiliates, and the percentage share of ownership of the subsidiary by the parent company; the extent of existing and new investments, including the sources of funds; the turnover and geographic breakdown of the network as a whole; the flow of intra-firm goods and services and the mode of pricing them and the nature of the technology that is proposed to be introduced as well as where alternative sources of technology can be developed.

56. Transnational corporations may not on their own wish to furnish information on the extent of implementation of terms and conditions agreed upon in the agreements establishing particular projects. For example, they may not pursue an agreed rate of employment and training of local people; they may also fail to develop national sources of supply for materials and equipment already agreed upon. Public information on all such issues may be lacking, and it is therefore important constantly to monitor establishment agreements.

57. As an attempt to tackle the problem of insufficiency and non-disclosure of information on transnationals, host countries may wish to insist on provisions in establishment agreements that require the presentation of business information going beyond that which most African company laws currently demand. The information should be such as to facilitate the analyses and assessment required for the formulation of rational and realistic government policies on international business operations. Furthermore, the problem of the lack of comparability of accounting information should be overcome by the negotiation and adoption of uniform international standards.

(h) Collective self-reliance through regional economic co-operation

58. The role and impact of transnationals on African regional economic co-operation constitutes a vital area requiring special mention.21/ The main problem is that most African States are severely handicapped in their capacity for planned economic change and rapid development by the limited range of national resources available to each of them; the small size of their national markets; the lack of capital needed to provide large-sized efficient industrial complexes: and the inequalities imposed by their small economic size in bargaining with foreign interests.

59. The range of natural resources available to a wider African regional economic unit would be such as to permit the manufacture of major agricultural and industrial products required by a modern economy. Moreover, investment could be concentrated in efficient large-scale plants and specialization in related industries, leading to rapid increases in productivity at reduced costs. In addition, such as economic unit would be able to exert significant bargaining power on the world market.

21/ For a full discussion of this issue see: Constantine V. Vaitsos, The role of transnational enterprises in the latin American economy: Who integrates with whom, how and for whose benefit? Report prepared for the UNCTAD secretariat, Lima, Peru, 15 May 1978.

60. The general expectations are that transnationals would not only welcome but could also actually work towards the achievement of such an economic framework, which would guarantee them economies of scale in production and wider markets for their products. Yet the actual policies and motivations of transnationals often compel them to sidestep African institutions for co-operation in preference for their own systems of product and market integration.

61. Yet transnational corporations tend to be primarily interested in economic integration only in so far as it affords them an opportunity to market their international brands of products either manufactured abroad or merely assembled by the branch plants or extensions of their production lines in Africa. In other words, while transnationals would seek to reinforce vertical integration, they do not appear to be enthusiastic about horizontal co-operation. Such an approach does not contribute significantly to the growth of technical skills in the community and to real industrial development, for what is largely involved is the utilization of existing facilities in the economic co-operation grouping.

62. Furthermore, transnationals tend to concentrate in activities such as mining where unit production costs are low but returns are high. But these are precisely the areas in which intra-African trade hardly exists. Moreover, since mining tends to be country-based, regional integration suffers a set-back-to the extent that corporation resources are geared towards the mining industry.

63. Unless adequate measures are adopted, a situation could be created whereby the advantages from regional economic co-operation are primarily realized by transnationals which undertake the production, marketing and distribution of commodities produced from integrated industries. The success of regional integration programmes is determined essentially by those who own and control the means of production, because effective decisions can be taken only by those who have the resources to back such decisions.

(i) Issues regarding ownership and control of resources

64. A major area of development policy relates to the problems of ownership and control of resources and the resulting relationship between host countries and transnationals. The main questions of significance include: (i) how to exercise effective control over the activities of transnational corporations and (ii) how to ensure an optimal degree of their integration into the local economy. The question of control of transnationals by host Governments continues to be one of the most controversial and confusing problems facing all parties concerned.22/ For the sake of clarity, it is useful to distinguish between two general approaches to control: majority government ownership (through equity participation, joint venture and the like); and effective policy control (through taxes and other regulations).

65. Various strategies can be chosen for effective control of the foreign company. For instance, a company can be simply subjected to the law of the host country in all its aspects as is the case in most industrialized countries. This means that any change in the law would be automatically applicable to the foreign company. But transnationals tend to resist this formula and insist on guarantees which would ensure respect of the negotiated agreement.

22/ See also, Karl P. Sauvant and Farid G. Lavipour, Controlling multinational enterprises: Problems, strategies, counterstrategies, Boulder, Colorado, Westview Press, 1976; and CTC, Transnational corporations in world development: A re-examination. op.cit.,

66. Another measure of control occurs when the host Government insists on reviewing all aspects of the projects on a regular basis, including development plans, budget, sales, employment, production levels, etc. But few corporations would be willing to be so constrained. In other cases government representatives sitting on the board of directors could have a veto power over all major decisions, even if the host Government holds less than 50 per cent of equity. But government representatives tend to be at a disadvantage vis-à-vis company officials who are in a better position to have access to vital information (provided by the parent company) and to manipulate technical data.

67. In the case of government ownership of over 50 per cent of equity, control can be exercised if voting rules are made to apply to the following questions: appointment and discharge of the chief executive officer, reinvestment policies, sales of the company's assets, loans, increase of capital, amendment of by-laws, transfer of shares, handling of dividends, appointment and discharge of board members and any substantial change in the project.

68. Three key factors which help to determine control are the composition of the Board of Directors, the role of the General Manager (or Managing Director) and resort to management agreements. The composition of the Board, which is generally proportionate to the share of equity held by each party, can be tipped in favour of the host Government through a special provision in the agreement. But despite the Board's mandate in making final decisions, the role of the General Manager is in practice more crucial than that of the Board. He usually has a broad mandate in the day-to-day decision-making process concerning all aspects of the subsidiary's operations. Although he is formally appointed by the Board, the General Manager is in fact generally designated by the parent company and comes from headquarters or from other subsidiaries.

69. Another way of controlling the General Manager has been to circumscribe the scope of his mandate by putting certain important decisions outside his jurisdiction. Such decisions would involve, for example, production levels, expansion, re-investment, profit determination and remittance, large-scale contracts and so on. Another approach would be for the Government to appoint its own General Manager whose function would be to share management responsibilities with the company appointed counterpart.

(j) The formulation and implementation of an international code of conduct

70. An issue which African countries would wish to monitor constantly relates to the on-going work on the proposed international code of conduct. The need for such a code originated from the deliberations of the Group of Eminent Persons who suggested, inter-alia, that the Commission on Transnational Corporations should evolve a set of recommendations which, taken together, would represent a code of conduct for Governments and multinational corporations to be considered and adopted by the Economic and Social Council, and review, in the light of experience the effective application and continuing applicability of such recommendations23/.

23/See United Nations. The impact of multinational corporations on development and on international relations, (E/5500/Rev.1: ST/ESA/6), New York, 1975.

The Commission established an Intergovernmental Working Group on a Code of Conduct to deal with this issue. The Centre on Transnational Corporations subsequently produced documents which outlined some of the issues relevant to a code of conduct, including the scope, content (substantive provisions), nature and machinery of the code, and a survey of various international instruments (universal or regional) dealing with transnationals 24/.

71. The nature of the code is envisaged as having any of the following three broad characteristics: (i) an international multilateral convention, signed and ratified by sovereign States (home and host Governments); (ii) a declaration of principles (and rules), adopted at an international conference by participating sovereign States, and (iii) a resolution of an international organization (e.g. United Nations General Assembly or Economic and Social Council). There is no agreement on these issues but the final decision on the form of a code to be adopted would largely be determined by how effectively it can be observed or respected by transnational corporations and their home Governments.

72. The basic issues to be the subject matter for a code of conduct are very complex but broadly would include the following (a) general principles of behavior (e.g. observance of local laws, adherence to social and economic goals of the host countries and abstention from corrupt practices; (b) policies and practices of transnationals (e.g. non-interference in political affairs, ownership and control of resources, transfer of inappropriate technology, consumer and environmental protection); (c) co-operation between home and host Governments and issues of jurisdiction in dealing with transnationals 25/.

PART III: SUMMARY AND CONCLUSIONS

73. The major transnational-related issues outlined in part II of this paper and which are likely to feature prominently in Africa's socio-economic development in the 1980s can be summarized as follows:

(a) The problems of financing economic development partly resulting from the excessive outflow of resources from African prompted by transnationals; the lack of direct and visible contribution by transnationals towards African's development objectives and priorities; the adoption of more favourable investment policies by transnationals;

24/ United Nations Centre on Transnational Corporations, International code and regional arrangements relating to transnational corporations, (E/C.10/9) and corporations issues involved in the formulation of a code of conduct (E/C.10/17).

25/ See United Nations, Centre on Transnational Corporations: Issues involved in the formulation of a code of conduct (E/C.10/17).

(b) The absence of any real desire by transnationals to contribute to the solution of unemployment problems in Africa as well as their reluctance to help to develop managerial and technical skills required in development;

(c) The problems of purchase and acquisition of technology from transnationals by African countries and the related excessively tight and exclusive control over the transfer of technology, including its research and development related to specific African needs, patents and licensing;

(d) The impact of transnationals on Africa's balance-of-payments positions including problems of "transfer pricing" and other unauthorized transfers of resources;

(e) Problems arising from restrictive and currupt business practices on the part of transnationals as well as their attempts to circumvent national laws and regulations concerning the conduct of business;

(f) Problems arising out of the relative weakness of the negotiating and bargaining capacities of African countries vis-à-vis transnationals owing to a lack of adequate and comprehensive information concerning the full scale of the operations of such corporations as well as the lack of appropriate institutions to deal with them; and

(g) The problems of restructuring the ownership and control of development resources and the marked reluctance, if not refusal by transnationals to accept host country jurisdiction over their activities.

74. This list, which is by no means exhaustive, is intended to highlight the magnitude of the issues involved. The ECA secretariat has already started to examine some of these problems in greater depth with a view to proposing appropriate policy actions which could be considered for adoption by member States. At this stage, however, it was thought opportune to confine the paper to a bare analytical presentation of the facts and issues, as they appear to the secretariat, with a view to giving member States the opportunity to discuss them and to consider the various implications especially at the policy-making level. It is hoped that the policy guidelines for a future course of action could be spelt out in a resolution which the Conference of Ministers may wish to adopt following its deliberations on this issue.